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BEFORE THE ARIZONA CORPORATION COM.

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Chairman  
WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
MIKE GLEASON  
Commissioner  
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Commissioner

Arizona Corporation Commission

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IN THE MATTER OF QWEST  
CORPORATION'S FILING OF RENEWED  
PRICE REGULATION PLAN

DOCKET NO. T-01051B-03-0454

IN THE MATTER OF THE  
INVESTIGATION OF THE COST OF  
TELECOMMUNICATIONS ACCESS

DOCKET NO. T-00000D-00-0672

AT&T'S REPLY TO QWEST'S  
RESPONSE TO AT&T'S MOTION  
FOR JOINDER

AT&T of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T")  
hereby reply to Qwest Corporation's Response to AT&T's Motion for Joinder.

Qwest Corporation ("Qwest") opposes AT&T's Motion to join Qwest  
Communications Corporation ("QCC") and Qwest LD Corporation ("QLDC") as parties  
to the above referenced proceeding. Qwest's response essentially makes two points: 1)  
neither QLDC and QCC meet the test for joinder, Response at 1-2, and 2) "AT&T seeks  
the joinder of QCC and QLDC simply so that it may more easily conduct discovery on  
these entities." *Id.*, at 3. Once again, Qwest attempts to limit the scope of the case and

compartmentalize the issues to serve its own interests.<sup>1</sup> The Commission must address for the first time in a major proceeding a fundamental question – how it is going to regulate Qwest and its operations where it claims the services are provided by regulated affiliates not parties to the proceeding, or where Qwest claims information is not in its possession but in the possession of its affiliates.

The Commission's rules shall govern in all cases before the Commission. R14-3-101(A). In all cases where the Commission's rules or orders do not address a procedural issue, the Rules of Civil Procedure for the Superior Court of Arizona as established by the Arizona Supreme Court apply. *Id.*

Rule 19(a) states:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the actions shall be joined as a party in the action if 1) in the person's absence complete relief cannot be accorded among those already parties, ... If the person has not been so joined, the court shall order that the person be made a party.

Qwest cites three cases in support of its argument that QCC and QLDC are not necessary and indispensable parties. Arguably, these cases are relevant to the Rule 19(b) "indispensable party" analysis; however, these cases are not relevant under Rule 19(a), the rule AT&T is relying on. Rule 19(b) comes into play when a party is necessary, but joinder is "not feasible," for example if joinder would destroy diversity jurisdiction. If joinder is feasible, as in this case, Rule 19(a) applies. The State Bar Committee Notes for the 1996 Amendment to Rule 19 explain this distinction:

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<sup>1</sup> For example, in response to AT&T's data requests, Qwest claimed that the access case was about the rate for access, not the cost of long distance service. After the access case and price cap case were combined, it appears that Qwest has abandoned this argument. Now Qwest claims the two proceeding are only about Qwest, not QCC or QLDC.

The present rule, with its judicial gloss in terms of indispensable, necessary and proper parties, has proved confusing and difficult to apply. The revision seeks to substitute practical procedure to deal with problems where otherwise desirable joinder is difficult. [Rule 19(a).] At the same time, it retains the basic principle that parties must be joined where this is required by "equity and good conscience." [Rule 19(b).]

In other words, Rule 19(a) was designed to make joinder more readily available.

However, it retained the concept of necessary and indispensable parties in Rule 19(b) where joinder was not feasible. The cases Qwest cites refer to indispensable parties in the context of Rule 19(b).<sup>2</sup>

Simply stated, Rule 19(a) was amended to make it easier to join parties to aid in the settlement of disputes. Rule 19(b) recognizes that there may be cases where a person cannot be made a party. The court then must determine if the person is indispensable to making a final determination of the matter before the court. If the person is indispensable the court must decide whether the case must be dismissed. There is no question QCC and QLDC are subject to the jurisdiction of the Commission. Therefore, Rule 19(b) never comes into play.

AT&T demonstrated in its Motion why adding QCC and QLDC would permit the Commission to grant complete relief requested by AT&T and the other interexchange carriers. However, in AT&T's response to Qwest's Motion to Revise Productivity

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<sup>2</sup> Rule 19(b): "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or it should be dismissed, the absent person being indispensable." *Town of Gila Bend v. Walled Lake Door Company*, 107 Ariz. 545, 490 P. 2d 551, 555 (1971), *reh. denied*: "or leaving the controversy in such condition that a final determination may be wholly inconsistent with equity and good conscience." *Douglas Investment Co. v Van Ness*, 105 Ariz. 541, 468 p. 2d 568 (1970), *reh. denied*: "or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Factor, AT&T raises additional issues, for example, cross-subsidization and the transfer of what historically have been Qwest revenues to QCC and QLDC.<sup>3</sup>

AT&T does not see how the relief it will seek can be granted without making QCC and QLDC parties, nor does AT&T see how the Commission can adequately address and resolve the issues that will be raised by AT&T and the other parties without making QCC and QLDC parties. The issue is not whether Qwest, QCC and QLDC want the affiliates to be parties; the issue is whether Qwest's regulated, affiliated long distance carriers should be made parties to a generic access investigation and a review of the costs and revenues Qwest charges for long distance services it provides itself and markets and sells on behalf of its section 272 affiliates.

On March 11, 2004, the Federal Communications Commission ("FCC") eliminated certain of the FCC's "operate independently" rules.<sup>4</sup> Qwest and its section 272 affiliates may now "use a single set of employees to perform operating, installation and maintenance ("OI&M") service for both their local and long distance networks."<sup>5</sup> Therefore, Qwest's arguments that Qwest and QCC and QLDC must operate independently are less compelling. In addition, the Commission should review any cost allocations of OI&M functions. As much as Qwest would like to maintain the legal notion that Qwest and its section 272 affiliates are separate corporations, for all intents and purposes, they are joined at the hip.

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<sup>3</sup> For example, there is a question whether Qwest's intraLATA long distance revenues have declined because QCC and QLDC are now selling the service instead of Qwest. Why should Qwest get a revenue increase to make up for revenues being collected by an affiliate that historically have been received by Qwest.

<sup>4</sup> FCC News Release, FCC Eliminates Rules in Order to Expand Long Distance Competition (March 11, 2004).

<sup>5</sup> Qwest and its affiliates are still prohibited from jointly owning switching and transmission facilities.

Qwest claims that AT&T seeks joinder of QCC and QLDC so it can more easily conduct discovery. AT&T will not deny that making QCC and QLDC will enable the parties to serve discovery requests on QCC and QLDC instead of having to serve subpoenas. However, it should not be forgotten that Staff will need to obtain discovery also. If QCC and QLDC are not parties and Staff is forced to use its general investigative powers to obtain general information, there is some question whether Staff may use such information in an adversarial proceeding or may share the information with other parties, which is normal in Commission proceedings. The issue, therefore, is much broader than whether AT&T will benefit. The overall process may also benefit.

It is AT&T's intention to make QCC and QLDC parties so the Commission can structure complete relief in the now consolidated access and price cap proceeding. If by making QCC and QLDC parties discovery becomes less burdensome, that is simply an added benefit that should not be discouraged or ignored.

Finally, the Commission has the authority to control its dockets and proceedings. In the past the Commission has ordered that certain parties or carriers be made parties to certain proceedings without any explanation simply to further the goals of the Commission. QCC and QLDC are regulated public service corporations. Making QCC and QLDC parties will benefit the Staff, the parties and the Commission. This is one case the Commission need not get bogged down in legal niceties.

For the reasons set forth herein and in its Motion, AT&T respectfully requests the Commission join QCC and QLDC as parties in the above referenced proceedings.

Submitted this 18<sup>th</sup> day of March, 2004.

**AT&T COMMUNICATIONS OF THE  
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**CERTIFICATE OF SERVICE**

(Docket No. T-01051B-03-0454, T-00000D-00-0672)

I certify that the original and 15 copies of AT&T's Reply to Qwest's Response to AT&T's Motion for Joinder were sent by overnight delivery on March 18, 2004 to:

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